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No. 92-929

In the Supreme Court of the United States

OCTOBER TERM, 1992

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, ETC., PETITIONER

v.

ROBERT R. DAVILA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, participating States are required to assure all children with disabilities a right to a free appropriate public education. The Secretary of Education construes this statutory requirement to include children with disabilities who are subject to long-term suspension or expulsion for behavior that is not related to their disabilities. The question in this case is whether the Secretary's construction of the statute is an interpretive rule exempt from the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 969 F.2d 485. The opinion of the district court (Pet. App. 17a-30a) is reported at 770 F. Supp. 1331.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. A petition for rehearing was denied on September 1, 1992. Pet. 2. The petition for a writ of certiorari was filed on November 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, "to assure that all children with disabilities have available to them * * * a free appropriate public education." 20 U.S.C. 1400(c) (Supp. II 1990).[1] In 1975, Congress found that more than half of all children with disabilities were not receiving an adequate education, and that one in eight were excluded entirely from the public school system. 20 U.S.C. 1400(b)(3) and (4) (Supp. II 1990). In many cases, parents were not notified or consulted before children with disabilities were excluded from the classroom. See *Honig* v. *Doe*, 484 U.S. 305, 309-310 (1988).

Under the IDEA, the federal government provides funds to participating States for special education and related services to eligible children with disabilities. Most of the funds are distributed to local educational agencies and intermediate educational units. 20 U.S.C. 1411(c)(1). To be eligible for funding, a State must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. 1412(1) (Supp. II 1990). The Act requires participating States to have plans with the goal of providing "full educational opportunity to all children with disabilities" and to make "a free appropriate public education * * * available for all children with disabilities." 20 U.S.C. 1412(2)(A) and (B) (Supp. II 1990). The Act requires the States to develop an individualized education program (IEP) for each child with a disability, 20 U.S.C. 1414(a)(5) (Supp. II 1990), and to establish procedures for parents to challenge their child's IEP and placement, and the educational services provided by the

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[1] The IDEA formerly was known as the Education of the Handicapped Act.

State. 20 U.S.C. 1412(5)(A) (Supp. II 1990), 1414(a)(7), 1415 (1988 & Supp. II 1990).

The IDEA provides that children with disabilities should be educated with children who are not disabled to the maximum extent appropriate. 20 U.S.C. 1412(5)(B) (Supp. II 1990). But the Act expressly contemplates alternative education outside the classroom, such as home instruction and instruction in hospitals and correctional institutions when such measures are necessary. 20 U.S.C. 1401(16) (Supp. II 1990); 34 C.F.R. 300.2; 57 Fed. Reg. 44,804 (1992) (to be codified at 34 C.F.R. 300.17). See also 20 U.S.C. 1412(5)(B) (Supp. II 1990), 1414(a)(1)(C)(iv) (1988 & Supp. II 1990); 34 C.F.R. 300.550 (public agencies shall ensure that special classes or separate schooling are provided only when the nature and severity of the disability warrants removal from classroom).

2. On September 15, 1989, respondent wrote a letter in response to a question from Frank E. New, an Ohio education official. See Pet. App. 39a-42a (the "New Letter"). The New Letter addressed the question whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the IDEA permit a State to cease providing educational services to children with disabilities who engage in misconduct that is unrelated to their disabilities. Respondent concluded that terminating educational services to such a child is permissible under Section 504, but not under the IDEA. Respondent explained that "[i]n order for a State to qualify for assistance under the [IDEA], a State must demonstrate that it 'has in effect a policy that assures all * * * children [with disabilities] the right to a free appropriate public education.'" Pet. App. 41a, quoting 20 U.S.C. 1412(1). Respondent noted that Congress enacted the 1975 version of the IDEA "foll w[ing] a series of landmark court cases establishing in law the right to education for all handicapped children," S. Rep. No. 168, 94th Cong., 1st Sess. 6 (1975), and

that one of those cases "involved the exclusion from educational services of children with [disabilities] with behavioral problems." Pet. App. 41a, citing *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). The agency did not solicit public comments before sending the New Letter, and the New Letter was not published in the *Federal Register*.[2]

3. On June 8, 1990, petitioner filed an action in the United States District Court for the Southern District of Indiana, alleging, *inter alia*, that the New Letter constitutes a legislative rule subject to the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553, and that the notice and comment procedure is also required by 20 U.S.C. 1417(b). Pet. App. 19a.

The district court certified a plaintiff class comprising all public school corporations in Indiana, and granted summary judgment for the plaintiffs. Pet. App. 17a-30a. The district court held that the New Letter announced a substantive or legislative rule because (1) it imposed a new and mandatory duty upon all school districts; (2) the IDEA does not expressly require the rule; and (3) this Court's decision in *Honig* v. *Doe*, 484 U.S. 305 (1988), does not require the rule. Pet. App. 28a-30a. The district court further concluded that 20 U.S.C. 1417(b) implicitly requires legislative rules to be published in the *Federal Register* in accordance with the notice and comment procedures of Section 553 of the APA. Pet. App. 27a-29a.

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[2] In May 1989, following a query from a Maryland education official, the agency responded with an unpublished letter expressing the view that, under the IDEA, a State may expel or suspend a student with a disability for misbehavior unrelated to the student's disability, provided that appropriate educational services do not cease. Pet. App. 9a.

4. The court of appeals reversed. Pet. App. 1a-16a. The court concluded that the New Letter announced an interpretive rule and therefore was not subject to the APA's notice and comment requirements. While acknowledging that "[t]he distinction between interpretive * * * and [legislative] rules [was] * * * far from crystal-clear," the court stated that "[t]he 'starting point' of the analysis is the agency's characterization of the rule." Pet. App. 6a, quoting *General Motors Corp.* v. *Ruckleshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985); *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987). In general, the court explained:

> An interpret[ive] rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights, or duties, the rule is properly considered to be a legislative rule.

Pet. App. 7a, quoting *GMC*, 742 F.2d at 1565. The court of appeals noted that a leading commentator has suggested that "[r]ules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power." Pet. App. 7a, quoting 2 Kenneth Culp Davis, *Administrative Law Treatise* § 7.10, at 54 (2d ed. 1979). The court observed, however, that Professor Davis's approach "is of limited value" where, as here, the agency "has both delegated rulemaking authority and the power to issue interpretive rules." Pet. App. 8a.

The court concluded that the New Letter "represents the paradigmatic case of an interpretive rule." Pet. App. 12a. The agency "simply stated what it thinks the [statute] requires. * * * The rule is based on specific

statutory provisions * * *, and its validity stands or falls on the correctness of the agency's interpretation of the statute." *Ibid.* The court observed that the New Letter "purports to be [the agency's] interpretation of the IDEA" and uses "the classic tools a reviewing body * * * relies upon to determine the meaning of a statute"—the statutory language, legislative history, prior judicial decisions, and an implementing regulation. Pet. App. 8a. Consequently, the court concluded, the New Letter did not "create[] new law, rights, or duties," but merely "state[d] what [the agency] thinks the statute means." Pet. App. 9a.

The court of appeals expressly rejected the district court's conclusion that the New Letter announced a change in long-standing agency policy. The court of appeals stated (Pet. App. 9a):

> There is nothing in the record to indicate that [the agency's] position is a change in policy—in fact, it appears that the question of whether schools that expel disabled students for reasons unrelated to their disability must continue to provide services, had not been considered before May 1989. In May, a Maryland education[al] official raised the question, and [the agency] responded in an unpublished letter that states must continue to provide some form of services.

In any event, the court explained, "an agency's change in its reading of a statute does not necessarily make the rule announcing the change legislative." Pet. App. 11a.

The court also rejected petitioner's argument that the rule is legislative because Congress has delegated to the agency the authority to promulgate legislative rules. The court observed that "[s]imply because an agency has the power to enact legislative rules does not mean that it has exercised that power" in a particular case. Pet. App.

12a. All agencies that administer statutes have authority to interpret them. The court noted that the authority to issue interpretive rules " 'preserve[s] agency flexibility' and 'allow[s] agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.' " Pet. App. 13a, quoting *American Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

Next, the court rejected petitioner's contention that the rule is legislative because it is mandatory and binding. The court noted that "[a]ll rules which interpret the * * * statute must be binding because they set forth what the agency believes is congressional intent." Pet. App. 13a. An agency could not announce, "We think Congress intended this when it enacted this statute, but you don't have to do it." *Ibid.* The court noted, however, that interpretive rules, although entitled to judicial deference, are not binding on the courts. Pet. App. 8a. In contrast, legislative rules "have the force and effect of law." *Ibid.*

The court of appeals explained that "[p]revailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative." Pet. App. 14a (citing authorities). Accordingly, the court concluded that "[t]he district court's reliance upon this rationale * * * is misplaced." *Ibid.*

In addition, the court of appeals ruled that the district court erred in ruling that, because this Court's decision in *Honig* v. *Doe* did not adopt the agency's interpretation of the statute, the agency's interpretation must be legislative. *Honig* did not reach the issue in this case. And in any event, the court of appeals noted, "[s]imply because a reviewing court disagrees with an agency interpretation does not render it legislative." Pet. App. 15a.

Finally, the court of appeals rejected the argument that 20 U.S.C. 1417(b) requires the agency to promulgate

its interpretation through notice and comment. The court concluded that Section 1417(b) did not eliminate the agency's inherent authority to interpret the statutes it is charged with administering. Instead, the court concluded that Section 1417(b) ensured timely implementation of major amendments to the Act without cutting short the comment period for legislative rules the agency would promulgate to implement those amendments. Pet. App. 15a-16a.

ARGUMENT

Petitioner renews its contention (Pet. 6-21) that the New Letter announced a legislative rule rather than an interpretive rule, and therefore is subject to the notice and comment requirements of the APA, 5 U.S.C. 553. That issue merits no further review. Although it is not always easy to predict whether a particular rule will be classified as "interpretive" or "legislative," the court of appeals correctly concluded that the rule at issue in this case falls into the interpretive category. There is no basis for petitioner's contention that other courts of appeals would have decided this case differently.[3]

1. In the New Letter, the agency construed 20 U.S.C. 1412(1) (Supp. II 1990), which requires participating States to "assure[] all children with disabilities the right to a free appropriate public education." The agency concluded that the States' obligations under the IDEA include an obligation to continue educational services outside the typical classroom setting for children sub-

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[3] The New York State School Boards Association and the California Department of Education have submitted amicus briefs challenging the agency's interpretation of the IDEA on the merits. Petitioner "has only challenged the [agency's] authority to issue its interpretation, not the interpretation itself." Pet. App. 15a. Accordingly, this case does not present the question whether the agency's interpretation of the law is correct.

ject to long-term suspensions or expulsion for behavior not related to their disabilities. The validity of the agency's construction stands or falls on its interpretation of the statutory language. The agency thus intended to issue an interpretive rule, not a rule "completely independent" of the statute. Pet. App. 7a. That straightforward analysis raises none of the doctrinal uncertainties that petitioner seeks to inject into this case.

a. Contrary to petitioner's suggestion (Pet. 9-10), there is no conflict between the decision in this case and the decisions of the District of Columbia Circuit in *Alaska* v. *Department of Transportation*, 868 F.2d 441, 445-447 (1989), and *Community Nutrition Institute* v. *Young*, 818 F.2d 943, 946-948 (1987). It is true that the opinions in those cases blurred to some extent the distinction between interpretive rules and "general statements of policy" (which are also exempt from notice and comment under the APA). But the District of Columbia Circuit clarified that distinction in *American Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1046-1047 (D.C. Cir. 1987). There, the court explained that general policy statements offer only the agency's "tentative intentions for the future," not a "binding norm." *Id.* at 1046. Accordingly, general policy statements do not bind agency officials or limit agency discretion. Interpretive rules, in contrast, permit agencies to restate statutory terms or explain ambiguous ones, and they reflect the agency's position on the statute. *Id.* at 1045.

More fundamentally, all interpretive rules are "binding" on the parties regulated by the statute in the sense that they set forth the agency's interpretation of the statute. As the court of appeals explained, Pet. App. 13a, it would make no sense for an agency to issue a rule setting forth its interpretation of statutory requirements, but stating that parties need not comply with

those requirements. The difference between interpretive and legislative rules is that the former, although entitled to deference, do not bind reviewing courts. See Pet. App. 8a.

b. Petitioner's reliance (Pet. 10) on *Rocky Mountain Helicopters, Inc.* v. *FAA*, 971 F.2d 544 (10th Cir. 1992), is misplaced. In that case, the Tenth Circuit stated that "a rule is substantive if * * * it changes existing law, policy, or practice." *Id.* at 546. In this case, the court of appeals found that the New Letter did not change existing policy. Instead, the court found that the issue simply had not arisen before May 1989. Pet. App. 9a. That factual determination merits no further review.

c. Petitioner also contends (Pet. 11-12) that the court of appeals' decision conflicts with decisions applying a "substantial impact" test to determine whether a rule is interpretive or legislative. In recent years, the courts of appeals have moved away from that test. See, *e.g.*, *Friedrich* v. *Secretary of Health & Human Services*, 894 F.2d 829, 836 (6th Cir.) ("extent of the impact is not an indicative factor"), cert. denied, 111 S. Ct. 59 (1990); *Industrial Safety Equipment Ass'n* v. *EPA*, 837 F.2d 1115, 1121 (D.C. Cir. 1988). In light of *Friedrich*, petitioner's reliance on an earlier Sixth Circuit decision is unwarranted. In fact, as *Friedrich* explained (894 F.2d at 836), the court's earlier decision in *Ohio Dep't of Human Services* v. *HHS*, 862 F.2d 1228, 1233-1234 (6th Cir. 1988), was not based on the substantial impact test, but rather on the fact that the agency had issued inconsistent interpretations of a regulation.

In *La Casa Del Convaleciente* v. *Sullivan*, 965 F.2d 1175 (1st Cir. 1992), the court of appeals noted that "[o]ther circuits * * * have moved away from considering the level of impact on interested parties as a factor in correctly classifying a rule or regulation." *Id.* at 1178 (citing authorities). The court noted (*ibid.*) that it had

looked to substantial impact "as a relevant factor in construing the intent of the agency" in *Levesque* v. *Block*, 723 F.2d 175, 182 (1st Cir. 1983). In *Convaleciente*, however, the court did not employ the substantial impact test, but instead based its conclusion that the rule at issue was interpretive on other factors. 965 F.2d at 1179. So too here, a variety of factors—including the fact that the New Letter relies on the language and legislative history of the IDEA, and "stands or falls on the correctness of its interpretation of the statute," Pet. App. 12a—show that the agency intended to issue an interpretation of the IDEA. Accordingly, there is no reason to believe that this case would have been decided differently by the First Circuit.[4]

d. Petitioner contends (Pet. 14-18) that the court of appeals' decision conflicts with *Chamber of Commerce* v. *OSHA*, 636 F.2d 464 (D.C. Cir. 1980). The agency rule at issue in *Chamber of Commerce* was contrary to the agency's prior position, a position that had been upheld in a prior decision of the District of Columbia Circuit. The court reasoned that the agency's rule was legislative because the "issuance of a different view solely as a matter of its own interpretation * * * would be a mere phasm of agency action, * * * [s]ignifying nothing." *Id.* at 469 (internal quotation marks omitted). Moreover, the court said, the agency "could not be explaining or clarifying the Act's language," because the court had already held that the Act did not impose an "existing duty." *Ibid.*

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[4] In *Levesque*, the court rejected the view that substantial impact, without more, renders a rule legislative. 723 F.2d at 182. Moreover, the court's determination that the rule at issue in *Levesque* was legislative was based on the facts that (1) the agency utilized the good cause exception to the notice and comment procedures, and (2) the rule was an amendment to an earlier legislative rule promulgated with notice and comment. *Id.* at 179-183.

Chamber of Commerce has no application in this case. In *Doe* v. *Maher*, 793 F.2d 1470, 1481-1482 (9th Cir. 1986), aff'd in part, 484 U.S. 305 (1988), on which petitioner relies in seeking to draw an analogy to *Chamber of Commerce*, the plaintiffs were expelled for conduct that was related to their disabilities.[5] Consequently, the Ninth Circuit's observations concerning the continuation of educational services to students expelled for behavior unrelated to their disabilities are dicta. Moreover, other courts of appeals disagree with the Ninth Circuit's conclusion that the IDEA permits States to discontinue all educational services in those circumstances. *Kaelin* v. *Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982); *S-1* v. *Turlington*, 635 F.2d 342, 348 (5th Cir.), cert. denied, 454 U.S. 1030 (1981). Cf. *School Bd.* v. *Malone*, 762 F.2d 1210, 1218 (4th Cir. 1985) (reserving question whether the State must continue to provide educational services to students expelled for misconduct not caused by their disabilities). In these circumstances, the agency's interpretation of the statute is not a mere "phasm of agency action, * * * [s]ignifying nothing." *Chamber of Commerce*, 636 F.2d at 469 (internal quotation marks omitted).[6]

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[5] The plaintiffs in *Doe* v. *Maher* were two children with disabilities who had engaged in "dangerous or disruptive conduct growing out of their disabilities." *Honig* v. *Doe*, 484 U.S. at 308. See also *Doe* v. *Maher*, 793 F.2d at 1476-1477.

[6] In *National Family Planning & Reproductive Health Ass'n* v. *Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992), the court concluded that "[w]hen an agency promulgates a legislative regulation by notice and comment, * * * whose meaning the agency announces as clear and definitive to the public and, on challenge, to the Supreme Court, it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule." Here, the agency did not seek

2. Finally, petitioner contends (Pet. 20-21) that under 20 U.S.C. 1417(b), all agency interpretations of the IDEA are subject to notice and comment procedures. Section 1417(b) provides:

> In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

Petitioner contends (Pet. 21) that the court of appeals' decision renders "meaningless surplusage" the statutory terms "amend" and "revoke." But the New Letter neither amends nor revokes a prior rule or regulation. And in any event, Section 1417(b) merely ensured the timely implementation of legislative rules implementing the 1975 amendments.[7] See Pet. App. 15a-16a. There is no basis for petitioner's contention that Section 1417(b) goes beyond that modest purpose and abrogates the agency's authority to interpret the IDEA.

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to amend a legislative rule, and no contrary interpretation by the agency had been presented to or upheld by this Court.

[7] Congress enacted Section 1417(b) as part of the 1975 amendments to the statute. Congress delayed the effective date of many of the new provisions until October 1, 1977. See 20 U.S.C. 1411 note. The January 1, 1977, deadline for legislative rulemaking gave the States an opportunity to meet their new legal obligations by October 1, 1977.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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